

1 CHAIRPERSON JAMES: We have a very substantive panel
2 in front of us and I'd like to open it up at this point for
3 questions. I'm going to go first to Mr. McCarthy, then over to
4 Mr. Wilhelm and then from there. Commissioner McCarthy.

5 COMMISSIONER MCCARTHY: Mr. Anderson, just let me
6 toss the softball first. You mentioned a series of conditions
7 that existed in many Indian tribes all of which I believe are
8 accurate; alcoholism, death rate, homicide, gangs, prior to the
9 arrival of gambling for many tribes. What you didn't give us was
10 the after, how all those statistics and conditions changed and I
11 don't want you to do that here, but I'd like you to do it in a
12 follow-up to tell us and specifically tell us, you know,
13 substantiate the reasons why what I took as an inference that
14 gambling was the significant cause in changing those conditions
15 if you would.

16 Now, two members of this panel have raised the
17 central issue that we kept hearing about in California yesterday
18 and I'll start with Mr. Anderson here. I'm troubled by what good
19 faith by the state means and I'm not sure I understood when you
20 said that the Department of Interior should appoint a mediator if
21 the tribe and the state don't agree for lack of good faith. So
22 I'm going to give you a couple of examples and you can answer.

23 The State of Utah doesn't have any form of gambling.
24 If a tribe in Utah wants to introduce Class II or Class III
25 gambling and the leadership of the State of Utah says, "I'm
26 sorry, but in this state we have a tradition of no gambling in
27 any form", is the leadership of the State of Utah in bad faith if
28 they don't permit whichever tribe in Utah it is that wants to

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1 initiate Class II or Class III gambling under your -- under the
2 Department of Interior's interpretation of the federal law?

3 MR. ANDERSON: In that circumstance the state would
4 not be in bad faith but as Mr. Gede described the Rumsey case
5 which is the law of the Ninth Circuit but the Department has
6 basically treated it as its position as well nationally, has said
7 that state -- where is state has reasonably characterized the
8 relevant state laws as completely prohibiting a distinct form of
9 gaming they don't have to negotiate for those particular tribes.

10 COMMISSIONER MCCARTHY: Now let me shift to
11 California and I'm sure there may be some members of this panel
12 that are close friends of the governors. I'm not sure I'm on
13 that list so I don't ask this question out of some partisan
14 feeling in any form. We have 100 recognized tribes in
15 California. A number of them have gaming. A number of them, of
16 course, feel very strongly that they should have the right to
17 Class III gambling forms which are otherwise prohibited in the
18 State of California.

19 Is it the Department of Interior's position that the
20 State of California is in bad faith if it says, "I'm sorry, it is
21 our policy not to allow these forms of Class III gambling for
22 anyone in our state. Therefore, we're going to be consistent and
23 now allow that for certain tribes that want Las Vegas type open
24 casino gambling, roulette, you know, whatever in all of its
25 forms. Is that State of California acting in bad faith?

26 MR. ANDERSON: As to the question -- and I think that
27 really was the issue in the Rumsey case, where the Department's
28 position, the governors' position is where the state law at issue

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1 here absolutely prohibit bank down percentage card game and non-
2 lottery slot machines, California could reasonably treat those as
3 distinctive forms of gaming for purposes of framing its criminal
4 prohibitions in that type of instance where they've completely
5 outlawed that particular form of gaming the state is not under a
6 duty to bargain.

7 Now, one side note to that; the relevant question in
8 such a case where there may be different facts is in light of the
9 traditional understandings, the text and legislative history of
10 IGRA, the state has reasonably characterized the relevant state
11 laws as completely prohibiting a distinct form of gaming. If the
12 state has not reasonably so characterized its laws, it would have
13 a duty to negotiate with respect to the gaming. This is where a
14 state -- the question is really whether it completely prohibits
15 distinct forms of gaming or whether it's merely regulating
16 certain forms of gaming. That's where courts begin to interpret
17 what's regulating a form of gaming or actually prohibiting.

18 But in the case of Rumsey where it was non-lottery
19 slot machines, the state was not under a duty to bargain.

20 COMMISSIONER McCARTHY: Has the Department of
21 Interior ever issued any kind of an opinion regarding the
22 situation in California?

23 MR. ANDERSON: The -- it's not issued any solicitor's
24 opinion. What it has done is in its advanced notice of proposed
25 rulemaking on its rule, basically adopted the Rumsey case which
26 is in the Ninth Circuit and is a California case as its rule
27 nationally. So to the extent that we've adopted a view that if a

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1 state completely prohibits gaming that is contained in our
2 proposed rulemaking notice.

3 Now, I think the questions you pose are not the hard
4 ones. The hard ones are these and I wanted to respond in part to
5 Mr. Gede's statements about good faith. Mr. Gede is a very well-
6 respected advocate for the State of California's views. The
7 courts in some cases, notably Seminole, have accepted those views
8 but the harder question comes when the Department is confronted
9 with this situation and I'll change the facts a little bit but
10 these are real live situations that have occurred.

11 A tribe and a state may have a compact and the
12 regulatory fee structure between the state and the tribe may be
13 100,000, 200,000 per year. The state has the option of renewing
14 that compact or not renewing. The week before or maybe even the
15 day before the compact is to be renewed, the state will say, "We
16 don't believe \$500,000.00 is sufficient. What we would like is a
17 share of all of the revenues of each slot machine, maybe 5, \$10
18 million. Moreover, we would like to agree to state regulation of
19 hunting rights. We would like you to not exercise your rights to
20 off-reservation fishing. We would like a labor union in your
21 organization as well. We would like to apply state regulatory
22 oversight and regulate the hours. Sign all this today, or else
23 we won't renew".

24 The question is, is that good faith or bad faith?
25 Mr. Gede has said that in his remarks that states have exercised
26 good faith. I don't have a doubt that certain federal judges in
27 that circumstance would say that the state has acted in bad faith
28 in that type of circumstance. So the first one is a softball but

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1 the second ones were softballs as well because those aren't very
2 close questions. What we encounter is things --

3 COMMISSIONER McCARTHY: You said those are not very
4 close questions.

5 MR. ANDERSON: Those are not very close questions.
6 Those have been answered by the Rumsey case. Where a state does
7 not put its demands on paper, where there are meetings where
8 there is no record but an implied threat that there will not be
9 renewal unless these are agreed to, that's really the situation
10 that we've encountered.

11 COMMISSIONER McCARTHY: Now the compact between the
12 State of California and the Pala Tribe includes requirements of
13 Workman's Compensation.

14 MR. ANDERSON: Yes.

15 COMMISSIONER McCARTHY: Still a softball?

16 MR. ANDERSON: Still a softball because in that case
17 the tribe and the state voluntarily agreed and there was no
18 indication from the tribe, the Pala Band, that there was coercion
19 or undue influence or tactics by the state.

20 COMMISSIONER McCARTHY: All right, now there are
21 negotiations going on with we're not sure, whatever we heard,
22 seven or eight other tribes that may enter into a comparable
23 compact but beyond that there are many other California tribes
24 that don't like those conditions and perhaps, we're not sure yet,
25 this is playing out, maybe they don't like the requirement of
26 Workman's Compensation. Softball?

27 MR. ANDERSON: A more difficult question because --

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1 COMMISSIONER MCCARTHY: They want to fight it. They
2 want a mediator from the Federal Government.

3 MR. ANDERSON: Well, in that particular case the
4 state has assured us that they are treating each compact
5 separately and differently, that this is a bargaining process.
6 If the state was to insist that this is a flat out model compact
7 that cannot be changed, it certainly would raise questions about
8 the bonafidees of the state in those negotiations.

9 COMMISSIONER MCCARTHY: Well, I didn't take part in
10 the negotiations but let us assume that it's the state's position
11 that protection of employees of certain basic living standards,
12 Workman's Compensation in case of a downturn in the economy and
13 unemployment arises, certain minimal health requirements if
14 they're non-existent and I'm not assuming they're non-existent.
15 I think they are existent on almost all if not all tribes that
16 have gambling operations now. I'm already convinced that they're
17 being financially supported.

18 But the state policy says, "Hey, this is for five
19 generations in this state. We went through this struggle a long
20 time ago about how we want to treat people who work in this state
21 and this is basic -- for the human condition this is basic to us.
22 This is in our minds, in our hearts we feel passionately that
23 working people should have these conditions". Operating in good
24 faith?

25 MR. ANDERSON: The key fact you mentioned is, is
26 there something sufficient in place or does the tribe have a plan
27 to begin that sufficiency and put it in place. If they do, if
28 the tribe as a government can take care of those issues as its

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1 own -- under its own laws, I think it raises a very close
2 question as to whether the state and where the tribe refuses to
3 accept those negotiations or conditions, whether the state has,
4 in fact, acted in bad faith given a viable alternative of the
5 tribal regulation scheme.

6 It's difficult without -- answering these in the
7 abstract. I think it raises a much closer question, particularly
8 if the tribe has in place or could put in place a viable
9 protection scheme for its workers.

10 COMMISSIONER MCCARTHY: I'm assuming that a number of
11 tribes want to do this on their own, so I'm not assuming
12 otherwise. On the other hand, I'm not sure that's true of all
13 just as it was certainly not true of a lot of employers in
14 California before this basic law and value system was created
15 many years ago. Now, there are, I don't know, at least 20 gaming
16 tribes right now and there could be many more. Would we have 20
17 or 30 or 40 different kinds of Workman's Compensation programs?
18 Who would look after those to make sure that that deeply rooted
19 philosophy of how we want working people to be treated would be
20 adhered to?

21 MR. ANDERSON: Well, I think that you find that
22 different among the states and how they treat their Worker's
23 Compensation --

24 COMMISSIONER MCCARTHY: Oh, indeed.

25 MR. ANDERSON: -- and 401K plans differ between
26 tribes.

27 COMMISSIONER MCCARTHY: Yes, but we're the State of
28 California and we have certain rights under the U.S. Constitution

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1 as do other states and we are attempting to stay consistent, to
2 stay faithful with how we passionately believe working people
3 should be treated.

4 MR. ANDERSON: I would say you don't have an
5 unfettered right on Indian lands to insist on in every aspect
6 your philosophy. It is a government to government relation
7 through negotiations.

8 COMMISSIONER MCCARTHY: Yeah, I'm talking about one
9 that's deeply rooted and is based in a value system. What you
10 suggested about waiting till the day before a compact has to be
11 renewed and saying, "Hey, hey, 100,000 isn't good enough any
12 more, we want a million". We understand that maybe that's a
13 little bit of unfairness in the negotiating process there without
14 knowing -- you know, we've all read the stories about certain
15 states and how they negotiated for a piece of the revenue or so
16 on. That gets into a more questionable marginal area.

17 Here I'm talking about something else. Well, you get
18 the point of what I said. I'll pass this onto someone else.

19 MR. ANDERSON: Mr. McCarthy, if I might just for one
20 moment, I did want to share just for maybe a minute. You were
21 talking about the effects and we will provide that in writing. I
22 do just have a few facts I wanted to share with you from
23 different tribes. These are basically circa 1996 but I think
24 they're still valid.

25 The Hochunk (ph) Nation of Wisconsin funds 90 percent
26 of its housing budget from gaming revenues. The Mille Lacs Band
27 and the Fondilake Band, Chippewas in Minnesota use gaming
28 proceeds to construct health clinics for their members. The

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1 Mille Lacs Band also built the first Indian school fully funded
2 by gaming revenues including both primary and secondary schools
3 at a cost of \$6 million. The most recent BIA data available from
4 '96 which covers only the beginning of Indian gaming shows that
5 between 1991 and 1993 employment of Indians in Michigan,
6 Minnesota, North Dakota, South Dakota and Wisconsin increased by
7 4500 jobs. Unemployment decreased by 880 Indian persons. The
8 unemployment rate decreased by seven and a half percent.

9 As a result of the casino the White Earth Band of the
10 Chippewa's unemployment in Monamine County, Minnesota was the
11 lowest in the five-county region. From 1990 to 1994 the
12 unemployment rate dropped from over 11 percent to about four
13 percent. And then finally in August '94 Michigan Indian gaming
14 enterprises employed 4500 people, 64 percent of whom were from
15 the surrounding communities.

16 Just a few facts antidotally of tribes where there's
17 been a clear beneficial impact since gaming. What we will try to
18 do is provide the staff as much study information as we have but
19 a valuable service of this Commission would be to have some
20 objective data presented that would describe the impacts but in
21 our view clearly beneficial in many, many cases.

22 CHAIRPERSON JAMES: Mr. Anderson, can I just ask you
23 a quick point of clarification? Could you just talk briefly
24 about the role of the Federal Government in terms of arbitration
25 between states and tribes when you believe it to be not in good
26 faith and is that -- just clarify that.

27 MR. ANDERSON: Right. What our proposed rule does is
28 lay out a process. That is -- I will quibble slightly with Mr.

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1 Scheppach's statement that there's no role for the state and it's
2 solely a federal/tribal process. At each stage of a process
3 where tribes and states can't agree with the state on a
4 particular form of gaming or a scope of gaming, the Secretary's
5 rule would allow and permit active dialogue, discussion, written
6 objections from the state, presentations from the state on what
7 their public policy might be as to distinct form of gaming.

8 CHAIRPERSON JAMES: I guess the specific question I
9 have is at what -- how does that get triggered? Does the Federal
10 Government determine that they need to arbitrate this or does
11 either party?

12 MR. ANDERSON: What would happen is we've asked for
13 comments on this. When there's a disagreement between a state
14 and a tribe, a federal mediator would be appointed to help
15 resolve and make recommendations to the Secretary.

16 CHAIRPERSON JAMES: So the decision would be that of
17 the Federal Government that they would intercede or intervene in
18 that situation?

19 MR. ANDERSON: Yes, ultimately the federal mediator
20 would make a recommendation on the last, best offers of the state
21 and tribe and the Secretary would ultimately decide under a
22 standard review that would allow federal court challenge if the
23 Secretary is wrong.

24 CHAIRPERSON JAMES: So a federal Secretary of the
25 Interior would make the decision that they would arbitrate a
26 dispute between a governor and a tribal leader.

27 MR. ANDERSON: Yes, with -- after full participation
28 and the process ultimately the administrative official, because

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1 of our unique relationship and authorities on federal lands, the
2 Secretary of Interior would make that decision with appeal then
3 to federal courts to determine whether the Secretary made the
4 right decision.

5 CHAIRPERSON JAMES: And the decision about whether or
6 not to initiate this process does not belong to either of the two
7 parties that would be involved in the arbitration but would be at
8 the discretion of the Secretary of the Interior.

9 MR. ANDERSON: Correct, with standards on, as we've
10 laid out in -- I mean, basically as in the colloquy with Mr.
11 McCarthy, I've talked about our view about what's the scope here.
12 It's not the scope that the Secretary could in any case say any
13 type of Class III gaming is acceptable. It would be looking at
14 whether the state relate a particular form of Class III gaming
15 and whether that is subject to his compact with the tribe.

16 CHAIRPERSON JAMES: Okay, and finally just for
17 clarification, where are we in the regulatory process with this
18 right now? Is it out for public comment?

19 MR. ANDERSON: The comment period closed June 22nd
20 and we had an enormous amount of comments from states, governors,
21 tribes and others and so I think the views are fairly well
22 understood. What is happening at the Department now is a review
23 of all of those comments to determine what new information has
24 been received. That process is ongoing. Currently Congress,
25 through what's called the Enzie/Reid amendment to our
26 appropriations bill for this year has deauthorized the ability of
27 the Secretary to actually implement regs this year. That
28 prohibition expires October 1st of this year. At that time the

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1 Department would be free to publish its regulations and then to
2 begin negotiations, but I expect that will be the subject of
3 numerous legal challenges as well.

4 CHAIRPERSON JAMES: Mr. Scheppach, can you tell us
5 what the position of the National Association of Governors is on
6 this particular recommendation?

7 MR. SCHEPPAH: Yeah, we've written, we're totally
8 opposed to that.

9 CHAIRPERSON JAMES: Go figure.

10 MR. SCHEPPAH: Pardon me? Surprise! We just -- we
11 thing it's unconstitutional. We don't think that there's any law
12 that gives the Secretary that right. Plus, I think we question
13 the objectivity of the Secretary given his trust obligations.
14 There's also some hope that the -- that we could, in fact, extend
15 the appropriations restriction on that for another year.

16 I mean, that's -- we're willing to come to the table
17 in November and talk about some of these issues and, in fact, I'm
18 leaving from this meeting to go to Milwaukee where our annual
19 meeting of governors is to discuss this bypass provision.

20 CHAIRPERSON JAMES: With the permission of
21 Commissioner Wilhelm, I will go to Commissioner Bible and then
22 back to Commissioner Wilhelm.

23 COMMISSIONER BIBLE: To follow up on this particular
24 line of questioning, Mr. Anderson, what would be your reaction if
25 this Commission took a policy position in terms of these
26 regulations and perhaps requested that they not be implemented
27 until after the work of Doctor Moore's subcommittee and the work
28 of this Commission was completed?

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1 MR. ANDERSON: I think the views of any viable entity
2 like this Commission are important. The National Governors'
3 Association has put in views, the National Indian Gaming
4 Association. The comment period has closed so I'm not sure what
5 the regulatory effect of that would be but I think views from
6 Congress and others and Commissions are always helpful.

7 CHAIRPERSON JAMES: Commissioner Wilhelm?

8 COMMISSIONER WILHELM: This is a great panel. I have
9 a number of comments and questions and the Chair should just shut
10 me up whenever it's appropriate.

11 CHAIRPERSON JAMES: All right, can we have -- no.

12 (Laughter)

13 COMMISSIONER WILHELM: I figured if I gave you that
14 one, you'd take it.

15 COMMISSIONER MOORE: May I suggest that we maybe
16 extend, if necessary, into our break period.

17 CHAIRPERSON JAMES: I will certainly take that under
18 consideration. What I would suggest is, I know how difficult it
19 is at least for some of us to sit through these long extended
20 periods without a break, so I would ask the audience's patience
21 if you see Commissioners come and go for small breaks while we
22 continue. Thank you.

23 COMMISSIONER WILHELM: I can't resist beginning by
24 making the slightly sardonic comment that having been a union
25 negotiator for nearly 29 years, welcome to the world of good
26 faith.

27 (Laughter)

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1 COMMISSIONER WILHELM: So far as I know -- that's a
2 serious comment because so far as I know, there are only two
3 legal schemes in the United States that rest upon the doctrine of
4 mutual good faith between negotiating parties. One which has
5 existed since 1935 is the National Labor Relations Act, which has
6 the precise obligation that you all are expressing frustration
7 with and the other one is this one, which of course, existed a
8 shorter time.

9 And certainly employers and unions often express some
10 of the same frustrations that you all have with the concept. On
11 the other hand, the basic theory is not a bad one, at least
12 philosophically. The basic theory is that the good faith notion
13 forces the parties to figure out how to get along. And the
14 moment you decide absent the agreement of those same parties, if
15 those same parties agree to go to an arbitrator or something,
16 that works because they both agreed to it, but the moment you
17 decide to layer upon the good faith negotiating concept the idea
18 that somebody else absent the agreement of both parties is going
19 to be the binding arbitrator, then I think what you do is you
20 eliminate as practical matter as well as a philosophical matter,
21 you eliminate the likelihood that anybody is going to negotiate
22 in good faith.

23 And in particular you eliminate the likelihood that
24 both parties at the same time are going to negotiate in good
25 faith because the likelihood is that at least one of those two
26 parties is going to think they're going to have a better shot
27 with this involuntarily imposed arbitrator, in the case of your
28 proposed rules, the Secretary of the interior. So while I

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1 understand as well as anybody in this room the frustrations of
2 the good faith negotiating concept and model, I would suggest to
3 you that to do what the Department proposes to do with it, will
4 throw out the baby with the bath water.

5 There will never be or rarely be good faith
6 negotiations between any state and any tribe if there's another
7 window that one party or the other can go to without the
8 agreement of both parties to go to that window. So I think your
9 regulations go someplace that everybody will feel bad about
10 having gone once we get there.

11 I'd like to return to the point that Commissioner
12 McCarthy was pursuing and I'd like to talk specifically about the
13 rights of workers in tribal gaming facilities to organize a union
14 if they choose to do so. As you are aware, there is a mechanism
15 for that in the Pala compact. It is the policy of the United
16 States of America that workers shall have the right to organize
17 and bargain collectively. It is the policy of the State of
18 California that workers shall have the right to organize and
19 bargain collectively.

20 It is the position of the national labor movement
21 that workers everywhere in the world, workers in Mexico for
22 example, workers in China, workers in Indonesia, that workers
23 ought to have the right to organize no matter where they are and
24 no matter for whom they work. And in fact, it's the position of
25 the government of the United States in its participation in
26 national labor organizations and numerous treaties, in numerous
27 pronouncements by the government and by the Congress that
28 workers, in general, ought to have the right to organize.

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1 So, until the Pala compact to the best of my
2 knowledge, although some tribal governments, for example, the
3 Navajo Nation, had promulgated on their own opportunities for
4 tribal employees to organize and bargain collectively.
5 Notwithstanding those exceptions to the best of my knowledge,
6 there's no tribal government that has promulgated the right of
7 employees of tribal gaming facilities to organize and to bargain
8 collectively.

9 So given those facts, Mr. Anderson, I would be
10 interested to know if the State of California or any other state
11 were to insist to the point of impasse on the right of the
12 employees of a tribal casino to organize a union and to bargain
13 collectively, in your opinion, would that constitute bad faith on
14 the part of that state?

15 MR. ANDERSON: I can't give you a definitive answer
16 now. Let me just back up, though, in terms of the scope of the
17 federal labor laws that apply across the country, haven't some
18 cases been held not to be applicable to Indian tribes? The basic
19 rule of law there is, do general laws of application, whether
20 it's the right to collective bargaining, OSHA regulations, Fair
21 Labor Standards Act, do they specifically mention Indian tribes
22 in their governing legislation?

23 There's been a principle of the Supreme Court that in
24 dealing with sovereign nations within our federal system, that
25 Congress must be clear and unequivocal when it applies such laws
26 to other inherent sovereign entities. Because of that, to answer
27 your question whether that would be good faith or not would

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1 really require an analysis of whether the NLRB considers those
2 laws to apply.

3 In my quick memory check, I think the NLRB in San
4 Francisco says those laws do not apply.

5 COMMISSIONER WILHELM: Respectfully, Mr. Anderson,
6 that statement makes absolutely no sense whatsoever. I don't
7 think there's any reasonable doubt that the National Labor
8 Relations Act does not apply to employees of tribal entities. I
9 think that's a fairly settled question. That's not the question
10 I was asking.

11 Precisely for that reason the employees of tribal
12 gaming facilities don't have the right to organize a union and
13 bargaining collectively. Obviously, if the National Labor
14 Relations Act applied they'd have that right. We wouldn't be
15 talking about this. They don't under the National Labor
16 Relations Act. So if the State of California or some other state
17 takes the position that because it's the policy of the United
18 States of America that workers generally ought to have the right
19 to organize because it's the policy of most of the states in this
20 country that workers generally ought to have the right to
21 organize, because it's the policy of the United States of America
22 in many applications that workers everywhere ought to have the
23 right to organize and because this Commission collected testimony
24 this week that I believe is undisputed that in the case of the
25 California tribal casinos more than 95 percent of the non-
26 managerial employees who work in them are not Indians, they are
27 ordinary workers in the State of California just like anybody

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1 else who works in the hospitality and gaming industry in the
2 State of California.

3 So given all of those facts, would it be the position
4 of the Department of the Interior that a state that, in this
5 example California, if it were it insist to the point of impasse
6 on the right to organize because the federal labor laws don't
7 apply and, therefore, those workers are in a legal no man's land,
8 what would be the position of the Department of the Interior?

9 MR. ANDERSON: It may well be that that is an act of
10 good faith. I can't say definitively. The only other issue
11 we've confronted Pala, as you mentioned. There, though, the
12 state and the tribe agreed that this was related to gaming.
13 These were activities --

14 COMMISSIONER WILHELM: Sure, that was a softball as
15 you put it.

16 MR. ANDERSON: Right.

17 COMMISSIONER WILHELM: I agreed.

18 MR. ANDERSON: Without any definitive facts, it would
19 be difficult to answer in the abstract. It may well be if the
20 tribe refuses to negotiate on that point or believes it has a
21 viable alternative under tribal law, it may well be that that is,
22 given the context of negotiations between Sioux sovereigns it
23 would be bad faith for the state to refuse to sign a compact
24 where they cannot reach agreement with the tribe on that issue.

25 I think you'd have to look at the facts and
26 circumstances. Is there some alternative that the tribe has in
27 place.

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1 COMMISSIONER WILHELM: It wasn't bad faith for the
2 government of the United States to insist in the North American
3 Free Trade Agreement that workers in Mexico ought to have some
4 rights, I don't think. Now, maybe it was. Perhaps it's the
5 position of the Department of the Interior that the Clinton
6 Administration was acting in bad faith in making those demands.

7 Okay, I'm sorry, I didn't mean to belabor that to
8 that length but you are in the wonderful world of good faith and
9 it's a very complicated world. Another example --

10 MR. ANDERSON: I'd only mention that good faith in
11 that case works two ways and if the tribe has its own labor laws
12 in place or has a plan to, is it bad faith then for the tribe to
13 insist on that as a condition of bargaining?

14 COMMISSIONER WILHELM: My final point on --

15 CHAIRPERSON JAMES: Before you move onto your next
16 point, I just wanted to hear Mr. Gede's comments on the question
17 that you put to Mr. Anderson, if you don't mind.

18 COMMISSIONER WILHELM: Certainly.

19 MR. GEDE: Thank you. There is some difficulty here,
20 in my view, as to coming to impasse. Unlike labor negotiations,
21 the negotiations in IGRA are between two sovereign governments in
22 which they are engaging their legislative discretion to permit an
23 activity which is -- which a legislature normally would permit
24 under a compact, we don't just call it a contract. And so we're
25 talking about governmental activity at its highest level.

26 The point I made earlier was that it's too easy to
27 get to bad faith and if there were incentives to allow legitimate
28 differences of opinion to continue to be discussed at the table

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1 before somebody raises the bad faith flag, then both parties
2 would be better off. What happens now is that any legitimate
3 difference of opinion results in somebody hoisted the bad faith
4 flag and it only goes against one party, the state.

5 In this particular case, I see no reason why you
6 can't come to impasse over legitimate differences. IGRA already
7 suggests that it's bad faith for the state to insist upon
8 taxation or anything other than reasonable administrative fees
9 for the gaming. There's no reason why Congress can't itemize
10 certain areas which are just bad faith. Everything else should
11 be good faith and then you're not off to court the minute
12 somebody has a legitimate disagreement and you could come to
13 impasse.

14 Now, the tribes frequently say impasse is
15 unacceptable because gaming is a right that the tribe should have
16 and the state shouldn't be able to stop it, but the point that
17 I'm making is that there may be legitimate differences of opinion
18 over legitimate policy issues that are the subject of the
19 legislative discretion of the two sides and when they come to
20 loggerheads and one side doesn't want to back down, that's an
21 impasse. And because there's two sovereign governments, it
22 should just be left at an impasse rather than having the
23 Secretary of the Interior jump into the middle of it and say,
24 "We're the federal mediator, we can take this sovereign
25 government, that sovereign government and mediate it.

26 If the rule goes forward, it will be litigated, the
27 states will bring lawsuits. Alabama and Florida will be first in
28 the door to litigate against it and I think that Senators Enzi

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1 and Sessions (ph) already have an extension of the current
2 moratorium that is before the United States Senate
3 Appropriations.

4 CHAIRPERSON JAMES: I don't mean to be flippant about
5 this at all but I have to express my concern about the Secretary
6 of Interior imposing federal -- the Federal Government in a
7 middle of a dispute between a governor and another -- well, if
8 it's two sovereign entities, then how about the Secretary of the
9 State?

10 MR. GEDE: Madam Chairman, can I clarify something
11 and with all due respect to Mr. Anderson? The proposed
12 regulation by the Secretary is not triggered on some breakdown in
13 the discussions between the state and the tribe. It's triggered
14 by a federal court dismissal under the 11th Amendment. If a
15 state is sued by a tribe for bad faith because they raised the
16 bad faith flag so rapidly and the state raises the 11th Amendment
17 in court as a jurisdictional bar, it need not. California has
18 never raised it. Under odd circumstances we did, but we don't
19 raise it as a rule.

20 And if the federal court says, "You're right, this is
21 an 11th Amendment jurisdictional bar", and dismisses the case,
22 the proposed regulation would kick in and the good faith and bad
23 faith of the parties is only one of multiple considerations that
24 the Secretary gives to the equation at that point. We've even
25 recommended that good faith shouldn't even be part of the
26 discussion for the Secretary. If the rule were to be upheld as
27 constitutional, which we doubt, we wouldn't even want bad
28 faith/good faith to be in there because we don't like the idea of

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1 the Secretary passing -- we find it fundamentally offensive to
2 the state sovereignty to have the Secretary of Interior of the
3 Federal Government pass on our good faith or bad faith just as
4 much as I assume the tribes would find it offensive to have the
5 Secretary of the Interior pass on the good faith or the bad faith
6 of the tribes. It shouldn't even be part of that equation.

7 The occasion is triggered solely by the federal court
8 dismissal under the 11th Amendment.

9 CHAIRPERSON JAMES: Thank you. That was sort of my
10 point but you said it so much better.

11 MR. ANDERSON: Madam Chairman, if I could expand on
12 that point and I did make that point in the opening that, yes,
13 this is -- a tribe and the state can always avoid the Secretary
14 by simply either agreeing or as the state waives its sovereign
15 immunity having a court decide but you expressed concern about
16 the secretarial procedures and the role. That has, in fact, been
17 the law for the last 10 years and when President Reagan signed
18 this law and Congress enacted it, it -- the procedure of having
19 the Secretary ultimately making the decisions has been the law
20 for 10 years.

21 So I want to disagree slightly with Mr. Wilhelm that
22 problem has always been out there, that the Secretary could be
23 the final arbitrator of this. Notwithstanding that, at least 24
24 states have come to agreement with tribes on these issues. So
25 it's not be the impediment. There's only been two times
26 procedures have been at issue and that's in the State of Arizona
27 here and in Connecticut. So even if this rule becomes a final

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1 rule for the Administration, we expect it's not going to be used
2 very often, if at all.

3 CHAIRPERSON JAMES: Commissioner Wilhelm?

4 COMMISSIONER WILHELM: The last point I wanted to
5 make about good faith is, you know, one way of looking at
6 negotiations is negotiations inherently are exercises in mutual
7 coercion. You can look at them as persuasion as well. In some
8 ways they are exercises in mutual coercion, so I'm troubled by
9 your statement that, well, somebody said that they were coerced.
10 Well, I don't ever remember settling a labor agreement even with
11 employers with whom we had wonderful relationships, we didn't
12 feel coerced in some fashion. Otherwise we would have got the
13 whole kitchen sink.

14 So as an example, we had repetitive testimony
15 yesterday from tribes which have reached compact agreements with
16 the State of California which have signed them and which are on
17 their way to you who said, "Well, we signed these things with a
18 gun to our head". Well, so you're going to reject them because
19 they were coerced, that's tough territory.

20 Having said that, I have a specific question on
21 another point of view, Mr. Anderson. You made the observation
22 that I believe our research subcommittee and probably the whole
23 Commission would very much agree with, that it would be valuable
24 for this commission to try to determine the real revenue picture
25 with respect to tribal gambling in the United States because as
26 you said, there is no definitively reliable available, publicly
27 available information on that and I wondered if we, to the extent
28 that the Department can or to the extent that the Department is

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1 in possession or has access to some of that information, could
2 the Commission have your Department's cooperation with respect to
3 that effort?

4 MR. ANDERSON: Yes, certainly. Most of it has been
5 provided in hearing from the tribes themselves in the hearing
6 process, but whatever information we have, we'll certainly
7 provide it to Director Kelly.

8 COMMISSIONER LOESCHER: Madam Chairman.

9 CHAIRPERSON JAMES: Certainly, Commissioner Loescher.

10 COMMISSIONER LOESCHER: A point of order, yes, a
11 point of order on that; the tribes have represented and certainly
12 our statute represents that information can be secured through
13 other governmental agencies of the Federal Government under cloak
14 of confidentiality and so we have that ability to deal -- to
15 secure information on that basis. And I wouldn't want it to go
16 forward here to say that the information that the tribes have
17 provided through the Indian Gaming Commission and through the
18 Secretary's office and the Bureau of Indian Affairs that's held
19 confidential would not be held confidential.

20 So we should make that clarification.

21 CHAIRPERSON JAMES: Yes, that certainly is the case.
22 Any information which is in the public purview is certainly open
23 to this Commission to have and to access. Any information that
24 comes into the hands of this particular Commission that is of a
25 proprietary nature would, indeed, be protected in that way by the
26 Commission itself and the staff.

27 MR. ANDERSON: I understand, Madam Chairwoman. The
28 tribes actually would like to get this information out because it

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1 shows a truer picture of what the benefit would be. I think
2 you'd find cooperation from them.

3 CHAIRPERSON JAMES: Certainly. Commissioner Dobson.

4 COMMISSIONER DOBSON: I know that we're running late.
5 Let me just ask a real quick question. It may not be a softball,
6 but it will be a fast ball. (Laughter)

7 COMMISSIONER DOBSON: We heard earlier today that
8 there is an assumption -- perhaps a belief in Washington and in
9 other places, that there are large numbers of so-called rich
10 Indians that are coming out of the tribes where there are casinos
11 and so on and I know that that is a cliché. But can you tell me
12 if there has ever been a reduction of federal subsidies in any
13 instance where there has been a very lucrative, perhaps even
14 small tribe on the basis of the amount of money that has been
15 brought in?

16 MR. ANDERSON: Yes, Mr. Dobson. A handful of tribes
17 have voluntarily relinquished their federal funds and returned it
18 back to their area offices of the BIA for the use of other tribes
19 in their areas, so that reduction has occurred. It's not been a
20 mandatory requirement of the Federal Government. We do have
21 programs, whether it's attorney fees programs or general
22 assistance that have a means testing component to it. Obviously,
23 if no one at the reservation is eligible for AFDC, they're not
24 going to receive that from the Federal Government.

25 As far as their general operating funds, some of the
26 most successful tribes have returned their money. What they have
27 asked for, though, in the bargain in returning that money is that
28 the federal trust responsibility, the federal pre-emption of

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1 trust lands of the federal relationship not be diminished. That
2 is what is of critical concern to them is that the relationship
3 simply because they've done well financially, is not diminished
4 by not receiving federal funds.

5 If we can make sure that link is secure with the
6 Federal Government so that we still as a government represent
7 their interests as a trustee, I think you'll see more tribes
8 voluntarily giving their money back to the government.

9 COMMISSIONER DOBSON: But it's all been voluntary.

10 MR. ANDERSON: Yes.

11 COMMISSIONER DOBSON: There's no mechanism at all for
12 the Federal Government to reduce federal subsidies.

13 MR. ANDERSON: That's correct. Of the 557 federally
14 recognized tribes, the three or four wealthy tribes have
15 certainly been open to that idea.

16 COMMISSIONER LOESCHER: Madam Chairman.

17 CHAIRPERSON JAMES: Commissioner Loescher and then
18 I'm going to go --

19 COMMISSIONER LOESCHER: I promise to ask only one
20 question since all the other questions have been asked fairly
21 well. I can't resist when you have an attorney general from a
22 state and then we have a representative from the governors to ask
23 this question which I've asked of all attorney generals that have
24 appeared before this Commission. You know, given the fact that
25 gaming among the states crosses boundaries, it's in the multi-
26 millions of dollars, it effects a lot of people and jobs and just
27 the constituencies involved, the fact that there's government to
28 government relations among Indian tribes and even among states

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1 over this issue, given all of the growth and controversy over
2 gaming in America, would you -- what would be your view if the
3 United States, under the interstate commerce clause regulated all
4 gambling in America creating standards and guidelines and
5 mechanisms for dispute resolution and revenue sharing as a matter
6 of federal policy across America?

7 MR. SCHEPPACH: I'm facing or the states are facing
8 pre-emption in insurance of health and interstate taxes on the
9 Internet, banking, security legislation and now you want to add
10 to the plate gambling. I think we've got a very, very serious
11 problem in this country about federal pre-emption of state
12 authority and so I would say that my knee jerk reaction would be
13 we would probably oppose it.

14 MR. GEDE: I would add that unlike other commercial
15 enterprises; selling shoes, growing and selling rice, gambling
16 has been in the traditional province of the states to criminalize
17 or decriminalize as they see fit. Gambling, the subject of your
18 study has occupied a unique niche in which the country as a whole
19 has seen it as something that should be criminalized in some
20 cases and decriminalized in other cases. As such, it is
21 traditionally within the province of the states to control and to
22 regulate. It has never been seen as the subject of a federal
23 matter under the Constitution.

24 I imagine that Congress could assert its power under
25 the interstate commerce clause to, quote, "regulate gaming", as a
26 federal matter but there might be serious 10th Amendment problems
27 with that because as to the criminal law side of it, the Federal
28 Government under the interstate commerce clause, cannot willy-

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1 nilly go about decriminalizing laws that states have adopted to
2 protect their citizens under their traditional reservoir of the
3 criminal law and here you are touching upon the criminal law.
4 And so I think Congress would have serious constitutional
5 problems if it attempted to do so.

6 COMMISSIONER LOESCHER: Thank you, Madam Chairman.

7 CHAIRPERSON JAMES: Thank you. Commissioner Wilhelm.

8 COMMISSIONER WILHELM: Mr. Coin, I would like to read
9 a brief excerpt from your written testimony that you didn't have
10 an opportunity to give within the time you were allotted. You
11 say, "We challenge this Commission to look beyond the
12 shortsighted view of some who hold that gaming is simply
13 immoral", and you say, "Poverty is immoral, hunger is immoral,
14 joblessness is immoral, disease is immoral. Gaming is a means
15 for Indian nations to end the immoralities heaped upon them
16 throughout 225 years of history".

17 I tried in earlier meetings of this Commission with
18 dramatically less eloquence than those words of yours to make a
19 comparable argument with respect to some of the most depressed
20 cities in this country, Atlantic City, for example. We had
21 lengthy testimony about the horrendous economic conditions in
22 Atlantic City prior to the decision by that community to adopt
23 and legalize gaming, or the city of Bridgeport, Connecticut,
24 statistically the third poorest city in America whose citizens
25 voted in excess of 80 percent to have gaming so they'd have some
26 economic base and whose wealthy neighbors legislatively prevented
27 them from doing so.

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1 I would just like -- I wanted that statement to be in
2 front of this Commission because it's, I think, both
3 extraordinarily eloquent and completely accurate and I would hope
4 that my colleagues on the Commission would recognize that when
5 they weigh up what's moral and what's immoral, that we have to
6 consider what is happening in this country particularly to people
7 who don't have advanced education. Just in the last week there's
8 two horrifying articles in the Los Angeles Times. One of them
9 said that one out of three children in the State of California
10 are living in poverty. And other one said that skid row in
11 downtown Los Angeles, historically mainly a place for single men,
12 is increasingly populated by women and children.

13 We're in trouble in this country. Indian
14 reservations because what has been done historically, are in more
15 trouble but we're in trouble and I think I agree with you that
16 gaming has to be an available option to those peoples and those
17 governments who think it makes sense as one way to deal with the
18 economic crisis and I thank you for your much better way of
19 putting that than I have been able to.

20 MR. COIN: Commissioner Wilhelm, if I may, Madam
21 Chair; there are a couple of I think real important benefits that
22 we tend to overlook. One of them clearly is the impacts that the
23 gaming opportunity has brought to reservations. There have been
24 some that would suggest that tribes are using gaming simply as a
25 basis for an economy. Tribes, without exception, around the
26 country have emphatically denied that premise.

27 Instead they are saying that gaming provides the only
28 means to a legitimate economy and we need to underscore that. The

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1 fact that tribes in their wisdom have understood that gaming may
2 not be around forever. And so the need for tribes now to use
3 this very small window of opportunity to take their revenues, to
4 invest in diversified economies, to invest in new ventures, to
5 invest in new opportunities, I think that's what our tribal
6 leaders are trying to do, recognizing again that the states'
7 rights and all other angles of arguments that will come upon us
8 in relatively quick time will force tribes to, I think, make some
9 serious -- undertake some serious planning with respect to
10 creating these economies on their own reservations.

11 CHAIRPERSON JAMES: At the risk of being
12 misunderstood and misquoted, let me take a point of privilege and
13 make a comment. I want to agree with my newfound good friend,
14 Mr. Wilhelm, absolutely with the litany of issues that were
15 raised that I think every one of these Commissioners would
16 absolutely agree are deplorable and, indeed, immoral conditions
17 within our country.

18 I said at the first Commission meeting that I believe
19 that morality and immorality have a place in the public policy
20 debate even on this issue and I challenged those individuals who
21 were concerned about that to come along side this Commission and
22 engage in a public debate on that subject. However, given the
23 mandate that we were given by Congress to talk about the social
24 and the economic impact of gambling, it is totally outside the
25 purview of this particular Commission.

26 But I don't want to leave the impression that it has
27 no place in the public debate, it just doesn't have a place in
28 this particular commission because I think it's important in any

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1 public policy debate to always engage in those kinds of
2 discussions. Commissioner Dobson.

3 COMMISSIONER DOBSON: Madam Chairman, I can't resist
4 but to respond to my good friend, Chairman Wilhelm (sic) about
5 the comment --

6 CHAIRPERSON JAMES: You can't give him my job.

7 COMMISSIONER DOBSON: -- that he just made because
8 obviously, I disagree very strongly with portions of that comment
9 where he sees homelessness and street people and poverty as the
10 solution to those difficulties through gambling but in my view
11 the source of those problems in some cases. We were just in
12 Atlantic City. We visited a homeless shelter there and heard
13 from the individuals who run that shelter there that many of the
14 people who come there are because of gambling and because of
15 addictions to gambling and they got in trouble in that way.

16 So I think gambling is not the solution to the
17 poverty of this country. It is the problem or at least a portion
18 of the problem.

19 COMMISSIONER MOORE: Madam Chairman?

20 CHAIRPERSON JAMES: Commissioner Moore. We're going
21 to hear some real wisdom now.

22 COMMISSIONER MOORE: Being so-called chairman of the
23 subcommittee on Indian gaming, I don't know why, Kay dislikes me
24 so I think that I know why, the remarks that I might make will
25 not be funny to someone. I'll put a little humor in them but you
26 know, Mississippi was one of the southern states and we thought
27 we needed southern rights, states rights, but the Yankees whipped
28 us 133 years ago and we had to succumb and I've almost forgot all

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1 of that, never did know much about it because I never did own a
2 slave, didn't bring any of them over here on a boat, never have
3 mistreated one.

4 My friends, I have friends who are black people. The
5 literature tells us, what little I've read, that one of the
6 troubles with our racial problems today is that we're afraid to
7 talk about it in the work place. I'm not afraid to talk about it
8 in the work place. I'm a director of a radiology department of
9 65, probably half of them are Native Americans, not Native
10 Americans, Afro Americans. We get along fine.

11 I consider my Indian friends, which I told them in
12 San Diego, I grew up with the Choctaw Indians, played baseball
13 with them, picked cotton with them, plowed if any of you know
14 what that is. I've even read in the literature where it would
15 probably be better to take care of some of Mr. Anderson's
16 problems of the Indian tribe if they did not live on a
17 reservation, that maybe the reservation living is a part of that
18 problem.

19 Now, I know that they have sovereign rights, nothing
20 I can do about that. I even learned yesterday that when I went
21 to the Mobile Airport and got a parking ticket, that that was a
22 slot machine. I had no idea that a lot machine was a slot
23 machine. I thought that was a thing that gave you a ticket and I
24 believed that you could take a pencil and push it and it would
25 give you an airplane ticket or it might give you something else.
26 Now, that was one of the arguments.

27 Now, I don't believe in government interference to a
28 degree but I consider the Native American not only a sovereign

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1 nation, if they want to say that, but you're an American citizen.
2 You get all of the benefits that I get. With all these others
3 that they're giving you, you're getting more than me. I don't
4 know whether I like that or not. You're a sovereign nation. I
5 asked yesterday why you didn't take all this money and put it in
6 a pool and help your fellow man, because someone said that there
7 are tribes that are just making it.

8 The United States Government, we give money to other
9 countries in foreign policy. I don't like that much but we do.
10 So what I'm saying is that maybe we need a federal regulation to
11 come out and tell everyone, tell them in Nevada -- it's Nevada,
12 I'm sorry -- to tell them in Nevada, tell them in California,
13 whether it's corporate gambling or whether it's Indian gambling,
14 what all of these classes are. What is Class III? Let them list
15 them. It's got to be a slot machine that you put a quarter in
16 and if you get three cherries, you get 75 cents, instead of all
17 of this other, and then it would not be any negotiation, there
18 wouldn't be any of this bad faith stuff.

19 You look down your list and you come to number three
20 and you say, "Buddy, you can't have it. We don't have it and you
21 can't have it". It doesn't matter if it's in Las Vegas or it
22 doesn't matter where it is, Tempe, Arizona. And I believe that
23 when this Commission gets together and we start writing, I'm only
24 speaking for myself but I can hear everyone talk, I believe that
25 we will ask Mr. Anderson's department or the Senate or the House
26 to do something to clarify all of this.

27 I would hate like heck to be the governor of
28 California with 107 nations inside my borders. Why we could have

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1 107 armies. That would be something. We'd be fighting each
2 other all day, shooting over the borders. So I believe if we
3 have, even though I recognize that you have a right, I probably
4 even recognize that you were treated wrong at one time.

5 Someone was probably here, as my friend, Mr. Loescher
6 said, this is the first time that I have to see him, that you
7 people probably took the land from someone. I believe I'm right
8 in quoting him on that. You know, we were being funny. It's
9 probably a dream but these are serious problems and I just hope
10 that you understand when we get ready to write a report that
11 we've got a hell of a problem. I just hope that everyone out
12 there understands this, but we're going to come out with a good
13 one, you can bet your bottom dollar on it.

14 COMMISSIONER LOESCHER: Madam Chairman?

15 CHAIRPERSON JAMES: I will give the final word to
16 Commissioner Loescher and then we will take a break.

17 COMMISSIONER LOESCHER: Thank you, Madam Chairman. I
18 don't philosophize very much on the Commission, but it is an
19 interesting panel we have here and the Commissioners are talking.
20 You know, in any other kind of industry the Department of Justice
21 and the Securities and Exchange Commission would weigh in when
22 they saw competing, huge competing parties like states involved
23 in gambling and lotteries and whatnot, tribal entities, the
24 private sector. When they have too much imbalance and
25 controversy, the Department of Justice would step in and the SEC
26 would step in and private sector and then they would weigh in.

27 In this situation, we have -- and you know, I look at
28 our statute for this Commission, we have some extraordinary

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1 challenges to try to define and express in a report and as mere
2 mortal citizens, we are dealing with sovereigns; the United
3 States, the state governments, tribal governments and you wonder
4 where all this goes. But you look at the situation where Native
5 Americans are and you think to yourself, my goodness, 33
6 governors are weighing in on this issue, 20 attorneys general
7 appear on issues. It goes on and on and the Native Americans,
8 you know, they're just trying to survive. They're trying to deal
9 with what they can under their governmental structures and their
10 place in the community.

11 And you look at where they're at, they're under the
12 U.S. Constitution, the Congress gets to oversee what they do and
13 then there's a concern about the Secretary and there was a
14 statement here by the Chairman worried about what the Secretary
15 is doing. My goodness, as a Native American, if the Secretary
16 wasn't weighing in on behalf of Native Americans, I'd be
17 concerned because that's their job. They have a trust
18 responsibility.

19 But just to sort of end this little colloquy, there's
20 a difference and I think the panels that we're seeing in
21 California, here in Tempe, in Gila River tomorrow and then
22 Albuquerque, I hope these tribal leaders are expressing to the
23 Commissioners that it's not -- you know, they see gaming as a
24 fleeting opportunity. They're concerned about their culture, how
25 it impacts the tribal government but the bottom line is that
26 they're using these gaming revenues to improve the community and
27 maintain the culture of their people and improve the quality of
28 lives of their people. That's what I'm hearing.

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1 In the face of all of this, Native Americans are only
2 11 percent of gaming in America, yet they draw the largest
3 interest that we've seen in the Congress and among the states and
4 whatnot. So hopefully as we move forward to draw this into a
5 report, we can keep all of this in balance and remember the
6 testimony that we received from so many of these tribal chairmen.

7 CHAIRPERSON JAMES: Let me thank you panelists. This
8 has been very informative. The testimony that you've offered
9 today helps us to understand, indeed, how truly complex this
10 issue is. We would ask that you stay in very close contact with
11 this Commission as we go through our deliberations and that we
12 can call on your expertise and your counsel and your wisdom as we
13 begin the drafting of our final report.

14 Let me also say to the Commissioners that in looking
15 at our schedule because I do realize that we are under time
16 constraints, there are planes that people must catch, there are
17 appointments that people have to keep, that I intend to try to
18 make up some of this time during our lunch work session and I
19 think we can gain most of it back there.

20 I would like to go ahead and take a break right now and
21 see if we can come back together at 11:20. Thank you.

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